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No. 1146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945—No. 160

ANTON IVUSICH,

Petitioner,

—*v.*—

CUNARD WHITE STAR, LTD.,

Respondent.

PETITION FOR WRIT OF *CERTIORARI*

ANTON IVUSICH,
By: JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of *certiorari* to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above case.

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is to be found reported in 1946, A.M.C. 250.

Statement of Jurisdiction

The jurisdiction of the United States District Court is based on Section 24 of the Judicial Code. Jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (U. S. C., Title 28, Section 347).

The judgment to be reviewed was filed on January 22, 1946 (R. 181).

The Statutes Involved

8 U. S. C. A., Sec. 41, giving an alien equal rights under the law;

The 14th Amendment of the Constitution of the United States;

46 U. S. C. A., Sec. 688, commonly known as the Jones Act.

Assignment of Errors

1. Holding that an alien did not have a right to a trial by jury in the Federal District Court.

2. Dismissing the action in the civil jury part and denying petitioner his right to a trial by jury. (The Court, however, dismissed the action without prejudice to continuing the action in the Admiralty Part.)

3. The Circuit Court of Appeals for the Second Circuit erred in sustaining the Trial Court's holding, that a shipowner was under no duty to provide a stevedore, employed aboard a vessel, with a reasonably safe place wherein to work and with sufficient, adequate and proper tools, appliances and implements.

4. It was error to sustain a dismissal of the libel when the same Circuit Court had stated in a previous action involving the identical situation, that a dismissal was improper. See:

Stewart v. *Baltimore & O. R. Co.*, 137 Fed. (2d) 527.

Summary Statement of the Facts

The petitioner's contention, as to the proximate cause of the accident is undisputed by the evidence. (There was some question of contradictory statements as to the question of steam, on which no feature of the case depended.)

The undisputed evidence and the finding of the Trial Court was that Anton Ivusich was seriously injured as a result of a draft of steel getting out of control and crushing Ivusich against the shaft tunnel of the vessel, the S.S. Empire Spray, on the 9th day of September, 1941 (R. 164, 165).

The uncontradicted evidence is that the lever on the winch in question worked stiffly before and after the accident and could not be moved at all at the time of the accident, thus making it impossible for the winchman to have control of the draft (R 164, 167).

The Circuit Court of Appeals for the Second Circuit sustained the Trial Court in finding that the ship operator owed no duty to the stevedore to provide him with implements (ship's winch lever) reasonably safe for the purpose intended (R. 168, 180).

The Questions of Law

1. Whether an alien is entitled to a jury trial, in the District Courts of the United States, on an action for a maritime tort.

2. Whether a ship is under any duty to provide a stevedore, with a reasonably safe place wherein to work and with tools, appliances and implements, reasonably safe for the purpose intended.

3. Whether an alien is entitled to the benefits of the Jones Act.

4. Having held that it would be improper to dismiss a cause of action brought by an American in the *Stewart* case, *supra*, it was improper to dismiss an alien's case on an identical situation.

Reasons for Allowance of the Writ

1. Equal rights under the law have been denied petitioner, when his complaint was dismissed by Judge Kennedy, on the 6th day of April, 1945 (R. 2).

This was a violation of the 14th Amendment of the Constitution of the United States and contrary to the provisions of 8 U. S. C. A., Sec. 41, and contrary to the uniform holdings of this Court and lower Federal Courts in the cases of:

Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 60 S. Ct. 153, 308 U. S. 165;
Stoll v. *Gottlieb*, 59 S. Ct. 134, 305 U. S. 165;
Martinez v. *Fox Valley Bus Lines, Inc.*, 17 Fed. Supp. 576, and cases cited.
Sagara v. *Chicago*, 189 F. 220.

2. Holding that a vessel was not liable for injuries due to a lever which failed to function, in a manner reasonably safe for the purpose intended, is contrary to the uniform holdings of this Court since the early cases of:

Imbrovek v. *Hamburg American Steam Packet Company*, 193 Fed. 1019;
The Arizona v. *Anelick*, 298 U. S. 110;

up to the recent case of:

Norton v. *Warner Company*, 64 S. Ct. 747;

3. Holding that a vessel is not obligated to provide a lever which can function properly, is contrary to the holdings of the Circuit Court of Appeals for the Second Circuit in the case of:

Stewart v. *Baltimore & O. R. Co., supra;*
The H. A. Scandrett, 87 Fed. (2d) 708.

4. Denying a stevedore, injured as a result of ship's gear failing to function properly, any of the rights as provided by the Jones Act, 46 U. S. C. A., Sec. 688, is contrary to the uniform holdings of this Court and in effect overrules the case of:

International Stevedoring Company v. *Haverty,* 272 U. S. 50.

5. Denying an alien the same rights as a citizen under the Jones Act is contrary to the holding by the Circuit Court of Appeals for the Second Circuit in the case of:

McGhee v. *United States,* unreported as yet (C. C. A., 2C.) decided March 5, 1946, Docket No. 20093

and contrary to the holding in the *Sagara* case, *supra,* where the Court stated on page 223:

"It must be held that the same right and privilege given to a non-resident plaintiff belongs equally to an alien where his suit has been removed from state to federal court."

In view of the foregoing, it would seem that where one defendant is substituted for another on consent, gives no less jurisdiction to a federal court than where a defendant

asked that the case be removed from the state to the federal court.

Having held that it was improper to dismiss an action predicated upon an identical set of facts, it was error to dismiss petitioner's cause of action.

The Second Circuit Court of Appeals stated in the *Stewart* case, *supra*, on page 529, citing the case of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 63 S. Ct. 444;

> "the likelihood of injury from the operation of a switch that was hard to turn cannot be said to have been beyond a reasonable apprehension * * *."

Discussion

On the 6th day of April, 1945, after both sides rested, Judge Kennedy dismissed the complaint, without prejudice to proceeding with the trial in Admiralty, by reason of the fact that both parties were aliens, although it appeared that the petitioner was a resident of the State of New York and that the defendant had submitted to the jurisdiction of the Court (R. 2, 6).

It was conceded that on the 9th day of September, 1941, that Cunard White Star, Ltd., (substituted by consent in place of British Ministry of War Transport, which was originally sued in the same court), owned, operated, managed and controlled the S. S. Empire Spray, the vessel involved in the accident (R. 8); that at the time, the petitioner was an employee of the Steamship Terminal Operating Corporation, in the capacity of longshoreman, engaged in the performance of his duties for his said employer, aboard said ship (R. 6, 10).

Judge Bright, the Admiralty Trial Judge, found that a draft of steel was suspended about 1½ feet above the floor in the hold of the vessel, when an order was given to lower the draft (R. 164).

The uncontradicted evidence was that the defective lever was the direct and proximate cause of the accident (see the testimony of Patty Amato, the winchman) (R. 81, 82, 84 and 85).

This was corroborated by the gangwayman, William Fortune (R. 52, 53, 54 and 55).

Timothy Reilly, the boss foreman explained the cause of the accident as being due to a defective lever by reason of the fact that it could not be moved, in response to the order (R. 26).

The respondent had due and timely notice of the defective condition before the accident, as it was testified that complaints were made to Captain Lewis, its superintendent, and the engineer of the vessel (R. 77).

When Captain Lewis was called as a witness, by respondent, he in substance, admitted this to be true (R. 153).

In spite of this uncontradicted testimony, the Lower Court sustained the findings of the Admiralty Trial Court that because, "The winch was used before and after the accident without event or trouble. It did not interfere with the work, or cause the men working with and around it to anticipate danger or accident" (R. 168) no negligence or unseaworthiness was proven (R. 168).

The Trial Court found as follows (R. 167):

> "There is no dispute in the testimony that this ship was a new one and that winches on new ships usually work more or less stiffly. There is no contradiction in the evidence that the lever on the up and down winch did work stiffly."

After the Trial Court having found that the lever did not respond to the winchman's effort to move it (R. 164,

165), and this being the *proximate cause of the accident on the uncontradicted and conceded facts,* the petitioner was entitled to a decree in his favor.

It is respectfully submitted that petitioner was entitled to the benefit of a jury trial in the first instance and to a decree in his favor in the Admiralty trial.

It seems too elementary to cite further cases on this point, as this Court has repeatedly held, ever since the *Imbrovek* case, *supra*, that a shipowner is liable for injuries caused by reason of ship's equipment, which is not reasonably safe for the purpose intended.

The petitioner claims that he is entitled to all of the benefits of a seaman, except that of maintenance and cure, as provided to seamen by the *Jones Act,* 46 U. S. C. A. Sec. 688, all of which rights have been denied him.

When a lever cannot be moved by a competent and thoroughly experienced winchman (R. 82), which situation results in a person being crippled for life, it does not seem just or reasonable to say, that because the winch was "O. K." new and not broken, that the injured man should suffer the entire consequences of the accident to the complete exoneration of the shipowner, who in the exercise of reasonable prudence, could have foreseen that such a lever would result in loss of control of the draft, with consequent injury to persons in its vicinity.

It would seem only just, that industry should be obliged to assume such risk and not the innocent longshoreman who has no choice but to work at the place and with the equipment provided by the vessel, or to go without employment.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, April 17, 1946.

ANTON IVUSICH,
By: JACOB RASSNER,
Counsel for Petitioner.

GEORGE J. ENGELMAN,
Of Counsel.